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ABSTRACT

This is a guidebook for teachers in the public elementary and secondary schools on the subject of their legal rights. While public education is a state function, governed by laws, authority is delegated to local school boards. Areas in which a teacher may come in conflict with the governing body of the school are described. Freedom of speech, in and outside of the classroom is examined, as well as freedom of association and political activity. The rights of teachers as citizens with constitutional protection are pointed out in the light of where those rights may be limited because of the sensitivity of the teacher's position. The private lives of teachers, their religion, sexual behavior, or manner of dress may conflict with the bias of the local school authority. In most of these cases the law is vague, and such issues are usually resolved on the basis of discretion rather than clearly defined legal points. The author discusses the issues in teacher employment: collective bargaining and strikes, mandatory retirement, tort liability, tenure, termination of employment, and teacher contracts. On many of the subjects covered in this book examples are given of challenges that were decided in state or federal courts. The legal issues involved in each case are clarified, and the reasoning of the court in making a decision is described. (JD)

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The Legal Rights of Teachers

Thomas Flygare

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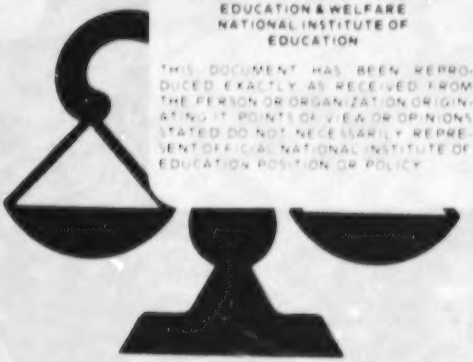

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THE LEGAL RIGHTS OF TEACHERS

By Thomas J. Flygare

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TABLE OF CONTENTS

General Legal Principles 5

Academic Freedom 8

Teachers' Private Lives 25

Issues in Employment 35

Conclusion 44

GENERAL LEGAL PRINCIPLES

Before addressing specific issues in teachers' rights, it might be advisable to explore briefly some general legal principles affecting teachers. It is generally true that education in this nation is a state function. Legislatures have, in turn, delegated day-to-day responsibility for public elementary and secondary education to local school boards. And courts have traditionally refused to reverse the policies of local boards merely because those policies were educationally unsound. Thus if local school boards operate within the purview of their delegated authority and do not violate the rights of any individual or group, their decisions are generally not reviewable under the present legal structure. That is, merely because a teacher or a group of teachers dislikes a local school board policy does not mean that the policy can be reversed by some state or federal authority. Rather, the burden is on the teacher to demonstrate that the policy or decision in question falls outside the scope of the local board's authority or that it violates a particular state or federal legal principle.

First, as suggested, local school board policy can be challenged as being beyond the authority given to the board by the legislature. Local boards have no inherent authority; they possess only that delegated by the legislature. Of course, this delegation is frequently so vague and sweeping that practically any policy enacted by the local board can arguably be brought under the delegation. Nonetheless, this remains a viable means for teachers to challenge local policy, particularly when boards endeavor to regulate or punish the personal lives of teachers. After all, to de-

fend a particular policy the school board must show that it is related to the proper operation of the public schools.

Second, school board policies can be challenged on the grounds that they violate regulations, statutes, or constitutional provisions of either the state or federal government. State legislatures have frequently empowered state boards of education to promulgate regulations or guidelines governing particular aspects of local school operation, such as curriculum or accounting procedures. Local boards generally cannot adopt policies in violation of these regulations. State statutes also often mandate particular actions and policies of local boards. For example, many states have laws requiring local boards to enter into collective bargaining negotiations with teacher groups. Refusal to bargain, therefore, is a violation of such a statute. Many state constitutions are replete with provisions governing the operation of local schools. These tend to have less impact on teacher rights than state statutes but should not be ignored when thinking through legal strategies to challenge local board policy. Relatively few federal regulations and statutes have an impact on the rights of teachers, but the impact of some of these has been significant. In the area of sexual and racial discrimination against teachers, of course, federal statutes have been particularly important. But perhaps the most pervasive force for expanding rights of teachers has been the United States Constitution. The freedoms of speech and association embodied in the First Amendment and the equal protection and due process clauses of the Fourteenth Amendment have been substantial factors in defining the legal status of teachers.

When grappling with ways to challenge a particular policy of the school board, teachers should not forget their contract. Many teacher contracts have become lengthy documents filled with descriptions of the rights and responsibilities of the teachers and the administration. The contract may cover everything from maternity leave to promotion procedures. A properly negotiated contract will also contain a grievance mechanism to provide a way to determine if a particular policy or action of the administration agrees with the contract. This process will almost always be less costly and time consuming than litigation.

It is evident from the foregoing that the analysis of teacher rights involves the interplay of numerous sources of law—regula-

tory, statutory, constitutional, and contractual. As specific issues are discussed on the following pages, an effort will be made to identify the source of the law used by teachers to assert their rights. Frequently, of course, disputes between teachers and local boards involve a conflict of legal authorities. That is, the board will argue that it has the legal power to carry out a particular policy, while the teacher will assert that the policy violates another legal provision. When teacher rights are discussed in this context, the competing legal authorities will be mentioned whenever possible.

ACADEMIC FREEDOM

"Academic freedom" is an umbrella term used to represent a number of professional and constitutional rights asserted by teachers. Although the first recorded defense of academic freedom is found in Socrates' *Apology*, the concept was given life in the German universities of the eighteenth and nineteenth centuries and was substantially broadened by civil liberties litigation in this nation during the past twenty-five years. Academic freedom can be said today to embody four elements: freedom of teaching, freedom of research, freedom of outside utterance and association, and academic due process. Although some of these elements may not be as applicable to elementary and secondary education as they are to higher education, they still serve as a useful framework within which to discuss the issues.

Freedom of Teaching

There are several aspects to the freedom of teaching. Perhaps the first is whether a teacher can refuse to teach a course prescribed by state or local authorities. Generally, of course, a teacher must teach whatever he or she is assigned. There are, however, several legal ways to resist an objectionable teaching assignment. A teacher might point out, for example, that the individual teaching contract described his or her position as that of an "English teacher," and it would therefore be a contractual violation for the school system to assign a class in math. State regulation or the master contract might also preclude a teacher from accepting a teaching assignment outside his or her area of certification.

If these seem to be frivolous grounds for opposing an objectionable teaching assignment, it should be pointed out that constitutional principles would aid the teacher in this situation only under very limited circumstances. If a teacher is asked to teach material which offends the teacher's religious or political beliefs, the teacher may be able to cite the famous "flag salute" case, *West Virginia State Board of Education* v. *Barnette* (1943) as authority for declining the assignment. Somewhat related is the case of the high school biology teacher who challenged an Arkansas law requiring teaching the literal interpretation of the Bible rather than the theory of evolution. The law was originally upheld in the famous Scope's "Monkey Trial" of 1925. More than 40 years later, the statute was challenged again. This time the case went to the Supreme Court where the statute was struck down on the ground that it involved an establishment of religion in violation of the First Amendment. *Epperson* v. *Arkansas* (1968). It is interesting to note that in the *Epperson* case the Supreme Court was also asked to strike down the anti-evolution law on the ground that it violated the teacher's freedom of speech. The Court declined to reach this conclusion because it was able to overturn the law on the narrower religious grounds. Thus it is fair to conclude that a teacher can resist an objectionable teaching assignment, but only under very limited circumstances.

Freedom of teaching can be looked at from a slightly different angle. Can a teacher be fired for something said or done in the classroom? It has been argued that the freedom of speech enjoyed by all citizens, including teachers, and the added protection of academic freedom give the teacher unbridled liberty to say anything inside the classroom. The courts, however, have never fully accepted the view that freedom of speech is absolute. The generally held view is that speech can be limited for certain narrowly defined reasons. Shouting "fire!" in a crowded theater is a venerable example of a situation where freedom of speech should be restrained. Likewise, certain restraints operate on the teacher's freedom of expression in the classroom.

When a teacher claims he or she has been dismissed for exercising freedom of speech in the classroom, the courts will look into the facts on a case by case basis to determine whether the local school board properly restrained the teacher's freedom of speech. To illustrate, suppose a teacher was dismissed for

advocating open marriage in a twelfth-grade social studies class. How would a court decide the case? Reading numerous cases involving similar facts suggests that the courts will examine a number of factors.

One of the first factors that courts will examine is the age of the students exposed to the objectionable speech. Naturally, courts will react differently to a case involving profanity before first-graders than it will to similar expression before high school seniors. The cases suggest that age is an important factor because it has a bearing on the students' ability to accept the teacher's words for their educational value rather than for shock value. Younger students, for example, might react to the advocacy of "open marriage" by imagining that their parents have a miserable marriage because one or both is not being frankly adulterous. Twelfth-graders, on the other hand, would probably accept the same lecture as one view of adult life which they are free to adopt or reject depending on personal preference. The court might well conclude that if students are old enough to marry they are certainly old enough to hear in the public schools a provocative lecture on marriage.

Another very important factor that the courts will examine in a case such as this is the relevancy of the objectionable expression to the course of instruction. Strong profanity presumably does not improve the teaching of trigonometry. To teach contemporary American literature, however, and the works of Mailer, Vonnegut, and Baldwin, to name three modern authors, some exposure to profanity is inevitable. If profanity was expressed in the classroom in the context of this course, it would be difficult to demonstrate that this was clearly irrelevant to the subject of instruction. Likewise, in the "open marriage" example the relevancy of the objectionable discussion would depend on whether marriage and family life is a part of twelfth-grade social studies. It deserves emphasis here that the irrelevancy of an utterance alone is not enough to push the speech outside the realm of protected First Amendment activity. Rather, relevancy is but one of several factors to be considered in determining whether classroom speech is constitutionally shielded.

Another factor that courts will consider, but apparently feel is less important than age or relevancy, is whether policies or regulations about classroom expression exist. Was the teacher on

notice that particular modes of speech would not be tolerated by the school board? This is particularly important in marginal cases where the speech is not patently offensive and where the court would be disturbed if the teacher was not forewarned about venturing into dangerous waters. The absence of policies or regulations, however, would probably not save a teacher if the classroom utterance was so outrageously improper as to violate any generally accepted concept of classroom behavior, given the age of the students involved. Conversely, the presence of school board guidelines prohibiting profanity in the classroom might not be sufficient legal cause for dismissing a teacher who uttered a classroom profanity relevant to the course of study in a class of mature students. Certainly the teacher would have a more difficult time winning in the latter case, however, because of the existence of the guidelines. The teacher's chance of winning would be improved if the guidelines were vague and overly broad. That is, a court might well overturn a teacher's dismissal if the guidelines on classroom utterance did not clearly distinguish between acceptable and unacceptable speech and had the tendency to suppress constitutionally protected as well as unprotected speech. For example, the Supreme Court has struck down a New York law prohibiting "treasonable or seditious" speech by a teacher. *Keyishian* v. *Board of Regents* (1967). Lower court cases where lack of guidelines proved fatal to efforts by school boards to discharge teachers for classroom speech include a case where the origin and meaning of a four-letter word were discussed in a literature class; where a junior English teacher discussed the word "fuck" as a part of a class on taboo words; and where a teacher assigned a Kurt Vonnegut story to a junior English class. But in a very interesting recent decision, the Tenth Circuit Court of Appeals held that even in the absence of guidelines teachers could be discharged for employing unconventional teaching methods, particularly when more competent teachers are available in the labor market. *Adams* v. *Campbell City School District* (1975).

Another factor which might influence a court is whether any reasonable alternative for free speech exists in the school. For example, assume students are particularly outraged by an administrative decision suspending a star athlete before a big game. The principal refuses to discuss the issue with any students, and

the student newspaper will not be issued until a week after the game. An English teacher despairing of any attempt to keep the students' minds on the assigned topic decides to channel some of their frustration into an exercise of drafting letters to the superintendent, members of the board of education, and other public officials protesting the athlete's suspension. Some of these letters ultimately find their way into a mailbox, and the teacher is fired for initiating the letter-writing exercise. This is a purely hypothetical situation, but actual cases suggest that the courts might take into consideration the lack of an alternative for the students or the teacher to express their feelings about the suspension. As Mr. Justice Fortas wrote for the Supreme Court in *Tinker* v. *Des Moines Independent School District* (1969), "we do not confine the permissible exercise of First Amendment rights to a telephone booth. . . ."

Another factor which appears to influence court decisions in this area is whether any disruption accompanied the classroom utterance in question. If there is no evidence of disruption, it is more difficult for the school board to prove that the utterance had a materially adverse impact on the students. Lack of disruption also suggests that the students accepted the utterance in a mature manner. It must be added quickly here, however, that merely because a disruption *does occur* may not be sufficient justification for the school board to dismiss a teacher for a classroom utterance. Again, Justice Fortas' opinion in *Tinker* is relevant:

> Any word spoken, in class, in the lunchroom, or on the campus, that deviates from the views of another person may start an argument or cause a disturbance. But our Constitution says we must take this risk; and our history says that it is this sort of openness that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.

Related to this is the question of whether a teacher may be dismissed because some students or parents object to words used by the teacher in the classroom. Courts do not appear to be overly impressed when this seems to be the main reason for the teacher's dismissal. In these instances, the courts will probably look more to the age of students and to the relevance of the utterance rather than the reaction of students or parents. The cen-

tral principle here is that courts have traditionally been reluctant to sanction the suppression of speech merely because the speech displeases some citizens.

Although this section has been devoted mainly to "pure speech," the principles discussed here apply also in large measure to "symbolic speech" in the classroom, such as the wearing of armbands, buttons, and badges. At some point, however, speech can devolve into actions which may be beyond the reach of constitutional protection. That is, some classroom behavior by a teacher might be characterized as speech, even symbolic speech, and has no educational value. In such a case, the teacher would have some difficulty in raising the First Amendment as a defense to dismissal action.

The paragraphs above have focused mainly on whether a school board has the legal power to dismiss a teacher for an objectionable classroom utterance. Let us shift gears slightly and, assuming that a school board has the legal authority to dismiss a teacher for a particular classroom utterance, discuss whether that authority should be exercised. It should be recognized by everyone involved in education, I believe, that students will graduate (or drop out) into a tremendously diverse society. In their adult lives, students will almost certainly be exposed to language and ideas more objectionable and more bizarre than anything that will be said in the classroom. The question then is whether officials are doing a service when they attempt to suppress classroom speech. Or would it be better to expose students to unconventional ideas in the controlled atmosphere of the classroom so that they will be more tolerant and more sophisticated when they confront these same ideas later. I don't profess to know the answers to these questions, but I believe it is fair to conclude that official acts to keep foul language and strange ideas from the ears of students are largely futile; they hear everything imaginable from their peers. This is not to suggest that there are no instances where a teacher's dismissal is warranted because of a classroom utterance. It is only to question whether the dismissal actually accomplishes the objective.

Freedom of Research

Research is normally not considered a part of an elementary or secondary teacher's job. This may be changing as teaching be-

comes viewed as a life-long profession rather than a stepping-stone to marriage or to another career. School systems may recognize that teaching skills may be improved if they do research and writing on the subjects they teach. This has long been one of the justifications for tax-supported research by professors in higher education. Many school systems now provide a partially or fully paid sabbatical year during which teachers are encouraged to study, do research, and write. Other systems are now allowing teachers access to school computers for their own research. These are encouraging developments, but they begin to raise questions about whether school systems can control the research done by its teachers.

Although freedom of research has long been a cornerstone of academic freedom in higher education, surprisingly little legal authority exists to support the concept. Accordingly, the best that can be done here is to list some of the problems surrounding research which have arisen in higher education. If elementary and secondary teachers wish to avoid these problems, I suggest they attempt to negotiate provisions in their contracts covering the following issues.

First is the question of whether the school system can determine the research objectives of the teacher. Second is whether the teacher can publish the research without prior approval of the school system. Related to this is the question of who "owns" the research data—the teacher or the school. Finally is the issue of who should evaluate the quality of a teacher's research. If a teacher's salary or position is dependent on the quality of research, the teacher may wish to urge that only people familiar with the discipline are competent to evaluate the research. Of course, if the research is done entirely on a teacher's private time, any control over the research will be dependent on the authority of a school system to control a teacher's private life. This topic will be discussed in greater detail in a later section.

Freedom of Outside Utterance and Association

1. Criticism of School Officials

Until fairly recently, teaching in the public schools was considered a privilege to which the government could attach any reasonable condition, including the sacrifice of constitutional rights. This doctrine no longer prevails, and the courts have recognized

that teachers have almost as much freedom of speech outside the classroom as any other citizen. Any discussion of this subject must begin with the landmark Supreme Court case, *Pickering* v. *Board of Education* (1968). Marvin Pickering, a teacher in Will County, Illinois, wrote a letter to a local newspaper in which he criticized the superintendent and the school board for the way they handled an earlier bond issue, for the distribution of school funds between academics and athletics, and for attempts to suppress teacher views during a bond issue election. After a full hearing, Pickering was fired. He appealed his dismissal all the way to the Supreme Court.

In its decision the High Court recognized that teachers have freedom of speech:

> Teachers are, as a class, the members of a community most likely to have informed and definite opinions as to how funds allotted to the operation of the schools should be spent. Accordingly, it is essential that they be able to speak out freely on such questions without fear of retaliatory dismissal.

While this statement was a strong endorsement of teachers' First Amendment rights, the rest of the opinion was replete with language which has been used to restrain teachers' freedom of outside utterance. First, the Court suggested that teachers might not be protected if their public speech interfered with harmonious working relationships in the school. Because Pickering was not in a close working relationship with the board or the superintendent, his letter could not be said to be disharmonious to his working atmosphere. It might have been different if his letter criticized his principal or department head. Second, although some of Pickering's statements were demonstrably false, there was no proof that he "knowingly or recklessly" made false statements. If such proof had existed, the Court might have reached a different result. Third, the false statements in Pickering's letter concerned matters of public record, that is, school expenditures for academics and athletics. The Court suggested it would have been harsher with Pickering if his false statements were about "matters so closely related to the day-to-day operations of the schools that any harmful impact on the public would be difficult to counter because of the teacher's presumed greater access to the real facts." Fourth, the Court emphasized that Pickering's letter involved "issues of public importance" about which Pick-

ering had "informed and definite opinions." The case might have turned out differently if Pickering was merely purveying gossip about school board members in a public forum. Finally, in a footnote, the Court indicated that Pickering's letter might not have been constitutionally protected if the school system had "narrowly drawn grievance procedures" by which teachers could "submit complaints about the operation of the schools to their superiors for action thereon prior to bringing the complaints before the public." Although Pickering survived each of these tests and won his case, other courts have seized on points discussed in the *Pickering* case to find that teachers could be dismissed for public utterances. On balance, however, *Pickering* was a significant victory for teachers, provided of course that they remember that the case gives them *qualified* rather than *absolute* freedom of outside utterance.

2. Political Activity

A number of cases have also reflected on the right of teachers to engage in political activity—either as a campaign worker or as a candidate. In 1947, the Supreme Court upheld the Hatch Act which prohibits certain political activity by federal employees in *United Public Workers* v. *Mitchell*. Subsequent decisions by the Warren Court concerning freedom of speech and association, however, caused some commentators and some courts to believe that the *Mitchell* decision was no longer good law. Accordingly, in the sixties and early seventies these courts struck down "little Hatch Acts," which restricted state and local employees, including teachers, from serving in political campaigns or running for office.

Many were surprised, therefore, when on June 25, 1973 the Supreme Court reaffirmed the much beleagured *Mitchell* decision of a quarter-century earlier and again upheld the Hatch Act against charges that it was vague and interfered with the First Amendment rights of federal employees. *United States Civil Service Commission* v. *National Association of Letter Carriers*. On the same day, with a 5-4 decision in *Broadrick* v. *Oklahoma*, the Court also rejected constitutional challenges to the little Hatch Act of the state of Oklahoma. However the impact of the *Broadrick* case is wider than Oklahoma, because as the Court noted, all fifty states have laws modeled on the federal Hatch Act. The persons challenging the law in this case agreed that restrictions on em-

ployee's political activities serve valid and important state interests by "attracting greater numbers of qualified people by insuring their job security, free from the vicissitudes of the elective process, and by protecting them from political extortion." Notwithstanding these valid state interests, plaintiffs argued that the law was unconstitutionally vague and overly broad. Specifically, they complained that one could not be sure what was legal and what was illegal under the law. Noting that "without question, a broad range of political activities and conduct is proscribed by the (law)," the Supreme Court stated the language of the law's provisions was clear enough that an "ordinary person exercising ordinary common sense can sufficiently understand and comply . . . without sacrifice to the public interest." The Court concluded that there was no question that (the law) is valid when it prohibits state employees from participating in a wide variety of political activity ranging from soliciting contributions for partisan candidates to riding in motorcades supporting any political party or any partisan candidate.

Several comments are in order regarding the relevance of the *Broadrick* decision to political activities by teachers. First, it deserves emphasis that teachers are not restricted in their political activity unless there is a Hatch Act-type law which applies to them. Some of the state laws mentioned and upheld by implication in *Broadrick* may apply directly to teachers on the local level. Others may not. If the state law does not apply to teachers, then one must ascertain whether there is any local law on this point. If there is none, then teachers are free to engage in political activities during their off-duty hours. In short, while *Broadrick* has the effect of upholding little Hatch Acts in all fifty states, it has no impact on teachers' political activity where such laws do not apply to teachers. Second, the law upheld in *Broadrick* restricts only *partisan* political activity; it has no impact on participation in nonpartisan elections. However, it seems clear that the rationale of *Broadrick* relating to the vicissitudes of the elective process and political extortion would serve equally well to uphold a local ordinance prohibiting teacher participation in nonpartisan elections. Finally, the law at issue in *Broadrick* contains a clause specifically allowing an employee "to exercise his right as a citizen privately to express his opinion and to cast his vote." Thus those covered by such a law remain free to speak their

minds about politics and free to vote, but not to engage in active political advocacy.

3. Loyalty Oaths and Related Programs

Loyalty oaths have caused a raging controversy since their introduction decades ago. Opponents argue that oaths do not promote patriotism among the indifferent and do not weed out those intent on sedition. Proponents ask why anyone should object to professing his loyalty and point out that falsifying an oath can serve as grounds for dismissing a disloyal teacher. The only verifiable fact which emerges from our experience with loyalty oaths, however, is that they have provoked a substantial volume of litigation. At least fifteen loyalty oath cases have reached the Supreme Court since 1952, and dozens of such cases have been decided by lower courts.

It is only a slight oversimplification to state that loyalty oaths divide into two categories: negative oaths and positive oaths. Negative oaths have typically contained language such as "I am not a member of . . ."; "I will not support the overthrow . . ."; or "I am not a subversive person. . . ." The Supreme Court has struck down a number of such oaths, most frequently on the ground that the language in such oaths is unconstitutionally vague and overly broad. That is, the language is not sufficiently clear to allow the signer to know if his or her behavior violates the oath. This has the "chilling effect" of discouraging constitutionally protected activity, such as normal political discourse, as well as unprotected behavior, such as treason. An additional ground for overturning some of these oaths was that they often had the effect of punishing innocent party membership without any proof of specific unlawful activity. This defect was a violation of the freedom of association, as embodied in the First Amendment.

Positive or affirmative oaths, as they are often called, became more prevalent as the old negative oaths were struck down by the courts. A typical positive oath reads: "I solemnly swear that I will support the Constitution of the State of _____ and of the United States of America and the laws of the State of _____ and of the United States." Oaths like these have been vigorously challenged on the grounds that they are unconstitutionally vague, curtail freedom of speech, and deny procedural due process. Generally the courts have turned their backs on

these challenges. One problem in challenging these oaths is that they are very similar to oaths prescribed in the Constitution for the President and other public officials.

The Supreme Court badly obscured what was a rather clear distinction between positive oaths which were deemed constitutional and negative oaths which were not in *Cole* v. *Richardson* (1972). In that case, the Court upheld a Massachusetts loyalty oath containing the clause: ". . . I will oppose the overthrow of the government of the United States of America or of the Commonwealth by force, violence, or any illegal or unconstitutional method." The Court inexplicably chose to classify this clause with the positive oaths which had been upheld in the past rather than with the clearly more similar negative oaths which had been struck down. Although the oath in this case applied to all Massachusetts state and municipal employees, including teachers, in Massachusetts, the plaintiff in *Cole* was not a teacher, and this may have had some impact on the result.

It is beyond the scope of this fastback to compile a list of all loyalty oaths applying to teachers. Such a compilation would doubtless confirm that a substantial portion of America's teachers must swear their loyalty before setting foot inside a classroom. One can only wonder why legislators continue to insist on oaths for teachers. Oaths appear to serve no useful purpose. They are an irritant to school administrators, who must defend the oaths and hope that all the teachers will sign. Those eliminated from the teaching profession because of loyalty oaths are generally not traitors but rather persons of honor who refuse to sign loyalty oaths for conscientious reasons. I tend to agree with the late Justice Black: "I am convinced that loyalty to the United States can never be secured by the endless proliferation of 'loyalty' oaths; loyalty must arise spontaneously from the hearts of the people who love their country and respect their government."

States have employed a number of other measures to test the loyalty of teachers. Arkansas, for example, had a law requiring teachers in public schools to file annually an affidavit listing every organization to which they had belonged or regularly contributed during the preceding five years. In *Shelton* v. *Tucker* (1960) the Supreme Court acknowledged that a state had the right to look into the fitness and competency of its teachers, but held

that Arkansas had exceeded this right and had infringed on the right of association implicit in the First Amendment.

Other cases have involved the refusal of teachers to testify about suspected subversive activity before legislative or administrative committees. These cases suggest that involuntary disclosure can be forced only when there is a legitimate governmental purpose. Teachers, like other citizens, are free to invoke the Fifth Amendment if the requested information would be self-incriminating. But courts have refused to recognize an "academic right of silence" based on freedom of speech. That is, teachers can refuse a valid government interrogation only if they have a legitimate fear of self-incrimination and not because they feel they have an inherent right as teachers to remain silent. Moreover, the Fifth Amendment was designed to protect a person from criminal prosecution based on that person's involuntary testimony; it may not protect a teacher from dismissal for insubordination as a result of refusal to answer questions. *Beilan* v. *Board of Education* (1958).

Academic Due Process

If a school system proposes either to dismiss a teacher during the course of the school year or to recommend nonrenewal of a teacher's contract, the teacher may possess some rights to notice and a hearing before the action takes effect. Before discussing these rights, it should be mentioned that whether or not a teacher enjoys the right to notice and hearing *before* termination, he or she still can challenge the termination in court on the grounds, for example, that the school board exceeded its authority, discriminated against the teacher on the grounds of race, sex, or religion, or punished the teacher for constitutionally protected behavior, such as free speech. These *substantive* rights are discussed throughout this fastback. What will be specifically discussed in this section are the *procedural* rights a teacher may have before or shortly after a termination or nonrenewal takes effect.

If a teacher is involved in termination or nonrenewal, several sources should be examined to determine if the teacher has procedural rights. Perhaps the first place to check is the teacher's contract. Some contracts prescribe detailed procedures to be followed before termination or nonrenewal takes place. Frequently, of course, contracts provide for a probationary period during

which the school system can decline to renew a teacher's contract without stating the reasons or giving the teacher a hearing. After the probationary period, a teacher has achieved tenure and the contract may provide that nonrenewal can occur only for certain specific reasons such as gross incompetence, insubordination, acts of moral turpitude, and economic exigency. If the contract is this detailed, it will probably also provide for written notice of the reasons for nonrenewal of the tenured teacher and an opportunity for a hearing before the school board. Less frequently, contracts contain procedural safeguards for mid-year termination.

If the contract provides insufficient procedural protection for the teacher facing termination or nonrenewal, the next place to look is to state law. Many states have statutes regulating tenure and establishing procedures that school systems must follow before terminating or not renewing a teacher's contract. My reading of the cases in this area suggests that many teachers successfully challenge their discharge or nonrenewal because local school boards fail to follow the procedures required in state law. A common characteristic of these laws is the setting of a date—March 15, for example—by which a school system must notify a teacher if it intends not to renew a contract. If notice of nonrenewal is not given by that date, the teacher can unilaterally renew the contract by giving the school board written notice of his or her intention to teach in the system during the forthcoming year. Similarly, if the school system offers the teacher a new contract for the coming year, then under these statutes the teacher usually has the responsibility to sign and return the contract by a certain date or the teaching job may be lost. I personally knew a tenured teacher who returned his signed contract two days late. The board refused to accept the contract. The teacher challenged the refusal but lost. It was held that in the absence of extenuating circumstances preventing the timely return of the signed contract, the tenured teacher had no rights to the position and furthermore had no rights to a written statement of reasons for the board's action or an opportunity for a hearing. The message is simple: If a statute exists to protect teachers' rights with respect to contract renewal, teachers must follow its terms as scrupulously as school boards.

In the absence of a contractual or statutory right to procedural safeguards before termination or nonrenewal, what protection

does the U.S. Constitution afford a teacher? Two cases decided by the Supreme Court on June 29, 1972—*Board of Regents* v. *Roth* and *Perry* v. *Sindermann*—provide some assistance in answering this question. Roth was a nontenured teacher at a state college. When his one-year contract was not renewed he was given no reason nor was he given an opportunity for a hearing. The Supreme Court held that insofar as Roth had no right to continued employment at the school, he was not entitled to procedural safeguards before nonrenewal. The Court rejected Roth's argument that simple nonretention damages a teacher's reputation so badly that under the Constitution he deserves a hearing to clear his name. If the college had accused Roth of dishonesty or immorality then he might have been entitled to a hearing. But the college merely declined to renew his one-year contract. Under the circumstances, the Court held that Roth had no right to a hearing.

The facts in *Perry* v. *Sindermann* were slightly different. Sindermann had taught in the public higher education system of Texas for 10 years. After some controversial activity as president of the Texas Junior College Teachers Association, Sindermann's contract was not renewed and he was given no hearing. Although Sindermann had neither contractual nor statutory tenure, the Supreme Court remanded the case to the district court to give him the opportunity to prove that the college had established a "de facto tenure program" through rules and guidelines and to prove that he qualified for tenure under this program. The Supreme Court held that such proof would obligate college officials to grant a hearing at Sindermann's request, where he could be informed of the grounds for his nonretention and challenge their sufficiency. Taking the cases of Roth and Sindermann together, it is clear that a teacher with no claim to continued employment and no proof of any tenure status is not entitled to a hearing, except possibly if the board announces that nonretention is due to the teacher's immorality or dishonesty. It is not necessary that the teacher possess contractual or statutory tenure. "De facto tenure" based on guidelines may be sufficient to establish entitlement to a hearing, though a school board cannot create tenure through guidelines if state law prohibits teacher tenure.

Interesting policy issues are raised by the question of whether

a probationary teacher should be given a hearing before nonrenewal of the contract. One is tempted to say, "Of course, it's the only decent thing to do." Deeper reflection, however, suggests that if school boards had to conduct hearings for every probationary teacher they wanted to let go, boards would be very reluctant to deny contract renewal to any teacher, even the most incompetent. As long as school boards are prohibited from discriminating on the basis of race, religion, and sex and cannot deny contract renewal solely because a teacher was exercising a constitutional right, such as freedom of speech, and as long as the board does not publicly accuse the teacher of immorality or dishonesty, then it is perhaps a good thing that school board members do not have to defend themselves in an adversarial context every time they wish to deny a new contract to a probationary teacher. Not everyone with a college education should be a teacher. A policy of hearings for probationary teachers would in my judgment perpetuate incompetence and inevitably diminish the quality of education.

The discharge of a teacher during a school year raises slightly different problems. Naturally, a school board cannot indiscriminately dismiss a teacher at mid-year if the teacher holds a contract. Unless the teacher does something to breach the contract, the board will be obligated to pay the teacher for the remainder of the year's salary and possibly pay other damages. In most cases of mid-year discharge, of course, the board asserts that the teacher broke the contract through certain behavior and that the board is therefore no longer bound by the contract to pay the teacher. Many of these situations end in cash settlements to avoid embarrassment and expense to all involved. When the matter cannot be amicably settled, the teacher may demand a hearing to contest the discharge. This raises the question of whether the teacher is entitled to such a hearing.

The quick answer to this question is "yes," regardless of whether the teacher has tenure. The rationale is that under the *Roth* decision even a nontenured teacher has a "property interest" to teach and be paid for the balance of the contract term. Because of this "property interest," the teacher is entitled to a hearing before mid-year discharge. An exception to this rule exists when the teacher's alleged behavior creates an emergency (by endangering others or substantially disrupting the education

process) in which case the teacher can be suspended pending a hearing. If the allegations involve moral turpitude, gross insubordination, or similar charges and are ultimately found to be true, courts generally do not require that the teacher be paid for the period from the beginning of the suspension to the hearing, though some commentators recommend paying the teacher during this period to avoid the possibility of paying higher damages later.

To sum up this section, academic due process describes certain procedural rights to which a teacher may be entitled before a contract is not renewed or is terminated in mid-year. These rights may be found in the contract, state statute, or the U.S. Constitution. Generally speaking, only teachers with tenure are entitled to notice and a hearing before nonrenewal of their contract. Nontenured teachers may be entitled to a hearing before nonrenewal if the school board accuses the teacher of dishonesty or immorality. Both tenured and nontenured teachers are entitled to a hearing before mid-year termination, except if the teacher's behavior causes an emergency, in which case the teacher can be suspended pending a prompt hearing. Whether or not teachers are entitled to these procedural rights, they remain free to challenge the discharge or nonrenewal in court on the ground that substantive legal rights were violated.

TEACHERS' PRIVATE LIVES

From time to time, on a slow day, the news media will carry an intriguing story about a male teacher who posed nude in a woman's magazine or a female teacher living with a man without benefit of wedlock. This is perhaps proof that the days are surely gone when teacher contracts contained provisions requiring the teacher to attend church and prohibiting the smoking of cigarettes or the drinking of alcoholic beverages. But one should not assume from recent events that school boards are now powerless to act against teachers on the basis of behavior off the school grounds. Unfortunately, not all the provocative incidents reported by the media find their way into case reports and we are left to wonder about their outcome. But enough cases involving the private lives of teachers are being decided by the courts to allow us to sketch out some general principles in this area.

Unconventional Sexual Behavior

As sexual mores in our society change it is inevitable that this will be reflected in the lives of teachers. Recent years have witnessed a dramatic increase in the number of cases in which school boards have attempted to discharge teachers who have been "caught" engaging in sexual behavior not generally accepted by society. For example, the California Supreme Court upheld the decertification of a teacher who, with her husband, was a member of a "swingers" group and was seen engaging in oral copulation with three men in one evening. The state's action was justifiable, in the words of the court, because the

woman's "flagrant display indicated a serious defect of moral character, normal prudence, and good common sense." A similar fate met a California junior college teacher found by police with a partially clad student in his car. Likewise, a New Jersey state court upheld the discharge of a teacher whose sex was surgically changed from male to female. (This teacher later filed a case in federal district court alleging the discharge was based on illegal sex discrimination. The court rejected this claim by finding that the discharge was due to the sex change operation rather than to the teacher's status as a member of one sex.) In these cases, as well as in most of the well reasoned decisions on this topic, the courts asked whether there was evidence on the record to support the contention that the individual was unfit for teaching. In the absence of such proof, many courts may be unwilling to accept that unconventional private sexual behavior means *ipso facto* that the person is unsuitable as a teacher.

The many cases involving homosexuality serve to elaborate this point. In a 1967 California case, the court found that evidence that a male teacher had engaged in homosexual acts on a public beach was sufficient to warrant revocation of his state teaching certificate. A similar result was reached in a 1972 California case where a male teacher's certification was revoked for masturbating and touching the private parts of another male in a public restroom. The California courts have also upheld the discharge of a male teacher who was apprehended while engaging in oral copulation with another male in a doorless stall of a department store restroom. Many of the cases upholding the decertification or dismissal of homosexual teachers have involved open acts of sexual conduct. In such cases, the courts' agreement that the teacher is unfit for the classroom appears to stem as much from the brazenness of the acts as from their homosexual nature.

More difficult issues arise, of course, where there is no evidence of overt sexual conduct but where a school board wishes to take adverse action against a teacher merely for expressing a homosexual preference. U.S. Courts of Appeals have ruled on three such cases but have not given us a clear statement of law on whether a school board can flatly refuse to hire or retain homosexual teachers. In one case the University of Minnesota refused to hire an otherwise qualified man as a librarian because

of media publicity about the man's homosexual activities, including his application to marry a male law student. The district court found there was no basis for refusing to hire the applicant, particularly since he would not be in contact with children. This was reversed by the Eighth Circuit Court of Appeals, which held that the Board of Regents possessed both the discretion and the evidence to conclude that employing this individual was not in the best interest of the university. The Supreme Court refused to review the court of appeals decision. *McConnell* v. *Anderson* (1972).

In another case, the prestigious Montgomery County (Maryland) school system, after finding out that a male teacher was a homosexual, first transferred him to a nonteaching position and then refused to renew his contract. The school board alleged that in his application for a teaching position, the teacher had withheld information that he had been active in a homosexual organization in college. The board asserted that if it had known this it would not have hired the teacher in the first place and would not now be in the position of having to defend his transfer and nonretention. The teacher asked the courts to declare illegal the board's policy against the employment of homosexuals. But the Fourth Circuit Court of Appeals sidestepped this difficult issue by holding that because the teacher had practiced deception to avoid the issue earlier (i.e., when he applied) he could not now contest the board's policy. As a part of the decision, the Fourth Circuit ruled that extensive media coverage of the case, much of it apparently prompted by the teacher, was not a strong enough reason standing alone to uphold the action of the school board. Thus, although advocacy of homosexuality may be protected by the First Amendment, the board had a sufficient independent ground—lack of full disclosure on the application—to take adverse action against this teacher. The Supreme Court also declined to review this case. *Acanfora* v. *Board of Education of Montgomery County* (1974).

A homosexual teacher was partly successful in challenging her dismissal where the school board had acted under a state statute allowing teacher discharge for immorality. The federal district court declared the statute to be unconstitutionally vague and ordered the school board to pay the teacher for the balance of the school year in which she was fired, half of the following

year, and $750 for attorney fees. The teacher appealed, arguing that she should have been reinstated to her teaching position, but the Ninth Circuit Court of Appeals held that the district court had not abused its powers by refusing to reinstate her. The Supreme Court declined to review the case. *Burton* v. *Cascade School District Union High School* (1975).

In conclusion, it is not yet clear whether school boards can legally maintain a policy of refusing to hire or retain homosexuals or others with unconventional private sexual preferences. In the absence of evidence that homosexuals are all unfit for classroom duty, it is entirely possible that a court may rule such a blanket policy to be arbitrary and unreasonable. The teacher who challenges such a policy, however, had better be faultless. Any evidence that the teacher has engaged in public sexual acts or withheld information from the school board would probably be fatal to such a challenge. On the separate question of whether a school board can discharge a teacher who publicly engages in unconventional sexual behavior or who openly advocates such behavior to students, the cases seem generally to hold that school boards are justified in concluding that such a person is unfit for teaching.

Marriage and Parenthood

"We are dealing here with legislation which involves one of the basic civil rights of man. Marriage and procreation are fundamental to the very existence and survival of the race." So said the Supreme Court in 1942 when it struck down an Oklahoma statute providing for the sterilization of certain habitual criminals. This demonstrates that the Supreme Court has given some recognition to the right to marry and bear children. This is the principal reason that cases raising the issues of wedlock and parenthood by teachers are treated separately from the issues in the preceding section. In short, the Supreme Court has accorded some constitutional protection to heterosexual marriages and procreation, but has not yet placed any constitutional imprimatur on homosexual liaisons. But it must be quickly added that, like the freedom of speech, freedom to marry and bear children is not absolute; it can be curtailed by the state to achieve legitimate objectives. A few recent cases shed some light on the authority of school boards to condition a teacher's job on matrimonial or parental status.

In a Minnesota case, a high school principal married a physical education teacher at the same school. Upon being informed of the couple's intention to wed, the school board adopted a policy prohibiting administrator-teacher marriages and prohibiting a husband and wife from teaching in the same building. After the marriage the board announced that the principal's contract would not be renewed. He took the matter to court alleging that the board's action was unconstitutional because it infringed upon his right to marry. The Eighth Circuit Court of Appeals conceded that the freedom of marriage was given some constitutional protection, but that "the policy in question here does not deny to people the right to marry; it only prohibits the employment of married couples in employment in administrator-teacher situations." Several points about the Eighth Circuit's opinion deserve comment. The court emphasized the potential problems of evaluation, work assignments, and discipline which might arise if a married couple were in an administrator-teacher relationship. But the court declined, on the ground that the facts in the case did not raise the issue, to decide whether the board could constitutionally prohibit a married couple from teaching at the same school. The court also stressed that because of the small size of the school district involved, neither the administrator nor his bride could be transferred to another school to avoid the potential conflict of interest. The court made clear that had the administrator showed some "reasonable alternative" which would have avoided the opportunity for conflict of interest but allowed him to remain in the system it might have decided the case differently. Thus, the Eighth Circuit's decision is narrowly drawn to cover only administrator-teacher marriages where no alternative to discharge is available. The Supreme Court refused to review the Eighth Circuit's decision. *Kecheisen* v. *Independent School District No. 612* (1975).

In another recent case, a Mississippi school district adopted an unwritten policy against hiring teachers with illegitimate children. As a result of this policy, one female teacher aide was discharged and another was summarily denied employment. They challenged the policy and the school board defended itself by asserting that "unwed parenthood is prima facie proof of immorality . . . and employment of an unwed parent in a scholastic environment materially contributes to the problem of schoolgirl pregnancies."

The Fifth Circuit Court of Appeals held that insofar as this policy could be applied only against females and was not rationally related to any legitimate objective of the school board it violated the Equal Protection Clause of the Fourteenth Amendment. Furthermore, because the school administration irrebuttably related unwed parenthood to immorality the policy also violated the Due Process Clause. The school board appealed to the Supreme Court which first agreed to review the lower court decision then changed its mind, thereby preserving the Fifth Circuit decision. *Drew Municipal Separate School District* v. *Andrews* (1976).

In another Mississippi case, three teachers were denied reemployment for violating an unwritten school board rule requiring all teachers to enroll their children in the public schools of the district. The teachers in this case had enrolled their children in an all-white private academy. The federal district court upheld the school board rule both because it was consistent with a court order requiring the board to take affirmative steps to end racial discrimination in the district and because students being taught by teachers sending their children to all-white academies would feel "negative social reinforcement." The Fifth Circuit Court of Appeals affirmed the district court decision on a 2-1 vote, but the two judges voting to affirm could not agree on a rationale. The Supreme Court has agreed to review this case, but has put off consideration of it until the 1976-77 term of the Court. *Cook* v. *Hudson.*

The three cases cited above do not comprehensively cover the waterfront of issues surrounding teachers' rights to marry and raise children, but they do provide a sample of the scope and complexity of some of the problems presently before the courts. These cases are useful also in highlighting the central principle in many of the cases involving marriage and childbearing by teachers: Although marriage and parenthood have been given a modicum of legal protection in recent years, a school board can still impinge on these rights as long as the board has a legitimate objective and does not administer the policy in an unconstitutional manner. The related issue of maternity leave will be discussed later in the chapter on issues of employment.

Dress and Grooming

The courts in recent years have been called upon to decide the

legality of a bewildering array of school board rules prohibiting certain modes of teacher dress and grooming. Although dress and grooming are frequently lumped together for discussion purposes, there is a subtle distinction between the two topics. Simply put, the distinction is that though teachers can change their clothes immediately when they get home after school, grooming styles cannot be as easily altered when teachers enter their private lives. Accordingly, grooming rules have a more significant impact on a teacher's private life than rules affecting teacher dress. This distinction is sometimes, but not always, significant in the resolution of these cases.

In the area of grooming, courts have generally struck down local school board rules against teachers with beards, mustaches, and sideburns. In a leading case, *Finot* v. *Pasadena City Board of Education* (1967), decided by the California Supreme Court, a high school government teacher with seven years experience in the system, arrived for the first day of school in the fall with a neat, well-trimmed beard grown during the summer. The teacher refused his principal's request to shave the beard and was transferred to home instruction. The California Supreme Court held that this action violated the teacher's constitutional rights. The court noted that beards have been symbolic of authority and wisdom and sometimes of rebellion. This suggested to the court that a beard may be considered an element of symbolic expression and accordingly must be given at least peripheral constitutional protection. The court found that though the rule against beards may be somewhat related to educational objectives, the burden on Finot's freedom of symbolic speech was greater than the benefits to the public. And if the school board wanted to prevent students from wearing beards, it could accomplish this goal with less drastic alternatives than requiring Finot to shave.

The *Finot* case was relied upon by a federal court in Florida when faced with a black teacher's refusal to shave his goatee as ordered by his principal. Several factors caused the court to rule for the teacher. As in *Finot*, the teacher's goatee was symbolic speech, enhanced by the teacher's belief that his goatee was an expression of racial pride. The court also noted that there were no school board rules on beards or goatees; principals were given unbridled authority to enforce their personal whims with respect

to teachers' grooming habits. The court also concluded that the order requiring the only black teacher in the school system to shave his goatee exhibited an intolerance of racial diversity. Because this person was conceded to be an excellent French teacher and there was no evidence that the goatee adversely affected the quality of his instruction, the school board could not refuse to renew the teacher's contract solely because he refused to shave off his goatee. *Braxton* v. *Board of Public Instruction* (1969).

As suggested above, courts sometimes treat rules of dress different from rules of grooming because clothing can be more easily changed than a grooming style when a teacher leaves the school yard. This may have played a part in a well-known decision by the Louisiana Court of Appeals, *Blanchet* v. *Vermillion Parish School Board* (1969). Blanchet, a father of seven, had an exemplary teaching record in the system for eighteen years when the school board adopted a rule requiring all male teachers to wear neckties. When he refused to obey, Blanchet was suspended pending his compliance with the rule. Blanchet filed suit asserting that the necktie rule was unrelated to any legitimate educational objective and that it violated his constitutional right to dress as he pleased. He proved that few other school boards in Louisiana required teachers to wear neckties, largely because neckties are extremely uncomfortable in the spring and summer months. The school board supported the rule by showing that professional men in positions of authority are generally expected to wear neckties. Because there was evidence on both sides of this dispute, the court felt it was compelled to defer to the judgment of the members of the school board who were elected by their community to administer the schools. And even if clothing can be viewed as symbolic expression, as suggested by Blanchet, the necktie rule does not unreasonably restrict such expression. Accordingly, the court ruled that the necktie requirement was valid and that Blanchet could be reinstated to his position if he pledged to comply with the requirement.

In a case decided by the New York Commissioner of Education, a female physical education teacher was told she could not wear a two-piece bikini-type bathing suit while giving swimming lessons to junior high school boys. The school system had no published guidelines on this but attempted to enforce an *ad hoc* rule against this teacher on the ground that her attire (or lack of

attire) was a "distracting and disruptive influence." The commissioner ruled for the teacher because he said the school system had failed to present any evidence that the wearing of this bathing suit caused any disruption to the educational process.

Dress and grooming cases do not always fit into a neat analytical pattern. But if a teacher wishes to press a case of this nature, I would suggest the following approach. First, determine whether the school board or administration has any written rule pertaining to the particular style at issue. If there is no published rule or well-known unwritten rule, then the school board will probably have the burden of showing that the particular mode of dress or grooming it seeks to alter has an adverse impact on the teacher's classroom performance or runs counter to some valid educational objective. A school board rule on point will probably be upheld by the court if the rule is arguably within the scope of the board's authority and is based on some evidence of its general validity, except if the rule infringes some constitutionally protected activity. In that case, the court may require evidence that the harm to the rights of the teacher caused by the rule is less than the benefit to the public, and that the rule's purpose cannot be accomplished by reasonable alternatives that are less burdensome to the rights of the teacher. The difficult part in such a case is convincing a court that the clothing or grooming style in dispute is "symbolic expression." Beards and goatees apparently fall into this category, and one could argue that an Afro hairstyle and a dashiki are symbols of racial pride. Other examples could be conjured up, but the point is simply that not all grooming and dress styles will be considered "symbolic expression." Accordingly, before staking a job in defense of a particular mode of dress or grooming style, a teacher might wish to work through the principles mentioned in this paragraph. This is not to say that all courts will approach these cases in precisely this manner. A number of other factors may enter a court's resolution of any particular case. But, generally speaking, if teachers follow the analysis I have suggested here they will find legal precedent to support their position.

Religion

A respected gentleman who had served on a school board in the Midwest for several decades once told me that when review-

ing teacher applications the board would automatically set aside any application from a Roman Catholic. It was not official policy and was not even articulated when sifting through applications. But it was understood by all board members.

This type of discrimination, not just against Catholics but against other religious groups as well, may still be practiced by school boards. Discrimination on the basis of religion in employment practices is illegal under Title VII of the Civil Rights Act of 1964, which became applicable to agencies of state and local government in 1972. But even in the absence of Title VII, it is arguable that refusal to hire persons of particular faiths as teachers would constitute an establishment of religion and restriction on the free exercise of religion in violation of the First Amendment to the U.S. Constitution. A slightly different problem arises when a school board desires to employ a nun or other religious personnel to teach in the public schools. Does this constitute an "establishment of religion"? The courts have generally held it is permissible to hire these people to teach in the public schools, but several states prohibit the wearing of religious apparel while in the public classroom.

Having established that a school board cannot condition employment on private religious beliefs, the question arises whether a teacher can object to certain practices in the school on the ground that these practices conflict with the teacher's religious beliefs. The case of *Epperson* v. *Arkansas* (1968), where the Supreme Court struck down a state statute prohibiting the teaching of evolution, is an example of a teacher successfully challenging an educational practice on the ground that it constituted an establishment of religion. Although the case did not directly involve teachers, *West Virginia State Board of Education* v. *Barnette* (1943) might serve as legal authority for a teacher who objects, on religious grounds, to participation in the flag salute and pledge of allegiance. In the *Barnette* case, students of the Jehovah Witness church protested their involvement in a daily flag salute ceremony in the schools. The Supreme Court held that these students could not be forced to participate in the flag salute. The same rationale would probably also apply to a teacher where religious faith precluded patriotic exercises.

ISSUES IN EMPLOYMENT

Every issue discussed in this fastback could, of course, be loosely classified as an issue of employment, because they all relate to the teacher as an employee of a school board. There are two factors, however, which roughly distinguish the topics in this section. First, they tend to be "bread and butter" issues related to working conditions and fringe benefits. Second, the topics in this section are not as fraught with questions of civil liberties and constitutional rights as are the preceding topics. Although there are a myriad issues that could be discussed in this section, I have selected five which seem to be the subject of most public interest at this time.

Collective Bargaining and Strikes

Employees of federal, state, and local government agencies are specifically exempt from the National Labor Relations Act. Consequently, collective bargaining for teachers is almost exclusively a matter governed by state statute. Needless to say, the fifty sovereign states have chosen to deal with the matter in many different ways. About twenty states have no laws providing for collective bargaining by teachers. In such states, it has generally been held that school boards may meet with teacher representatives to discuss working conditions unless this is specifically prohibited by law. But it has also been held that in such states there is nothing to compel school boards to meet and discuss working conditions with teachers. Thus, while teachers may be free to organize in these states, school boards do not have to negotiate with teacher representatives if they do not wish to do so.

About thirty states have passed laws pertaining to negotiations by teachers. More than half of these states have comprehensive statutes which establish terms under which teachers can organize and require school boards to enter good faith negotiations. Other states have simpler laws which require the school board only to "meet and confer" with teacher representatives.

Most states which provide for teacher bargaining also determine by law the matters which can be bargained between teacher representatives and school boards. The scope of bargaining in these states varies so greatly that generalization is almost impossible. Some states limit bargaining to "wages, hours, and other terms and conditions of employment," which is taken from the National Labor Relations Act. Other states expand on this definition by allowing bargaining on educational policy or on any mutually agreed upon matter. The trend seems to be away from general guidelines covering the scope of bargaining to more specific delineations of the items which are fair game at the bargaining table. Nevada, for example, passed a law in 1975 which lists sixteen specific topics that school boards are required to negotiate with teachers.

Because of the diversity of state collective bargaining laws, there has been increasing support for a federal law governing labor relations with employees of state and local governments. Supporters of such a federal law point out that the present patchwork of laws spawns strikes and other inefficiencies, because state and local workers may base their organizational expectations on what is allowed in a neighboring state. Further, because many strikes and much labor hostility has been fomented by the refusal of public agencies in some states to recognize bargaining units for their employees, this situation could be corrected by a national law establishing uniform standards for the recognition of public employee unions. Opponents of such a federal law assert it will dampen local diversity and place increasing control of the schools and other public agencies in the hands of the federal government. Several bills have already been introduced in congress to standardize public employee relations. With powerful teacher groups supporting such legislation, it is closer to reality than imagined several years ago.

Even though teachers may have the right to organize and bargain with the school board, it is settled law that the board

retains the full authority to make the final decision on any topic raised at the bargaining session. What can the teachers do if they are dissatisfied with the board's final offer? One approach would be to work for the defeat of those board members at the next election. A much more controversial approach is to go out on strike. Strikes by teachers are illegal in most states. When teachers illegally strike, a variety of legal measures can be taken against them. Teachers can be individually fined or jailed, and the teachers' organization can be fined. Most important perhaps is that in some states teachers can lose their jobs for participating in an illegal strike. Several cases were recently before the Supreme Court regarding the power of school boards to summarily discharge teachers for engaging in illegal strikes. The teachers asserted that due process requires that they receive a hearing before discharge, but two lower courts held that subsequent hearings are constitutionally sufficient. The Supreme Court declined to review these decisions. *Lake Michigan College Federation of Teachers* v. *Lake Michigan Community College* (1976) and *Crestwood Education Association* v. *Crestwood Board of Education* (1976).

In a related case, *Hortonville Joint School District No. 1* v. *Hortonville Education Association* (1976), an interesting issue was raised. After prolonged bargaining, some teachers struck the Hortonville (Wisconsin) schools. Teacher strikes are illegal in Wisconsin. The school board responded by firing the striking teachers and hiring replacements. The teachers went to court and asserted that they had been denied due process because the school board members were not impartial in the dispute which led to the strike and therefore could not be impartial in determining if discharge was a reasonable penalty for striking. The Wisconsin Supreme Court agreed with the teachers, and the school board appealed to the U.S. Supreme Court.

The Supreme Court reversed the Wisconsin court. It held that in the absence of any evidence that the members of the school board had a financial or personal interest in the decision of whether to discharge striking teachers or had personal animosity toward the teachers, federal due process does not require the disqualification of local school boards solely because they have "mere familiarity" with the facts of the situation. The Court noted that under Wisconsin law the school board is given sole

authority to hire and discharge teachers. Due process does not displace this authority unless the school board has demonstrably lost the remnants of objectivity.

Nondiscrimination and Affirmative Action

As mentioned above in the context of a teacher's private religious beliefs, Title VII of the Civil Rights Act of 1964 became applicable to local school boards in 1972. Title VII prohibits discrimination in employment practices on the basis of race, color, religion, national origin, or sex. The Vocational Rehabilitation Act of 1973 prohibits discrimination by any agency receiving federal financial assistance against any otherwise qualified person solely because of a handicap. A comprehensive discussion of the impact of these laws would fill several volumes. Suffice it to say that the nondiscrimination laws not only forbid a school board from refusing to hire a person because of the factors listed in the laws, but also protect a person from receiving disparate treatment in compensation, fringe benefits, teaching assignments, promotion, or any other practice or policy if that treatment is predicated on one of the forbidden criteria.

Title VII is administered by the U.S. Equal Employment Opportunity Commission (EEOC). A person who believes that a Title VII violation has occurred can file a complaint with the EEOC. The EEOC will investigate the complaint, and if the investigation supports the allegations, the complainant will be issued a "right to sue" letter. The complainant can then file suit in federal district court. Unfortunately, this can often be a very time-consuming matter. One case, for example, where the person filed a Title VII complaint with the EEOC in June, 1972, is not expected to go to trial until 1978. Backlogs both in the EEOC and in the courts have contributed to some of the delays. The EEOC, however, often settles cases through conciliation talks with the parties. The Vocational Rehabilitation Act is administered by HEW. If a person believes discrimination on the basis of a handicap is being practiced by a school system, a complaint should be filed with HEW. The complaint will be investigated and if it is supported by facts, HEW will attempt to resolve the complaint through informal means or initiate administrative proceedings to cut off federal aid to the school system.

Many states also have laws prohibiting various forms of discrimination. If a particular complaint appears to fall under both

federal and state law, the EEOC has a policy of referring the complaint to the state antidiscrimination agency for a certain length of time. If the state agency has not acted within that time, the EEOC can take jurisdiction over the complaint.

Much confusion about affirmative action has been evident in the media lately. To my knowledge, there is no federal law which establishes mandatory goals and timetables applicable to public elementary and secondary schools or which in the absence of a finding of prior discrimination requires schools to develop affirmative action plans, though some states may require these things. Affirmative action in higher education is required under Executive Order 11246 signed by President Johnson in 1965. This order requires all firms or institutions holding *contracts* with the federal government totaling more than $50,000 and involving more than fifty workers to develop an affirmative action plan regarding women and minorities. This requirement applies to many large universities because of the government research and development contracts held by these institutions. But almost all the federal financial assistance received by public elementary and secondary school systems is in the form of grants under categorical programs. Since Executive Order 11246 does not apply to grants, elementary and secondary schools are under no federal affirmative action requirements. Several federal laws applicable to schools, however, do allow HEW to require affirmative action plans if patterns of prior discriminations are found. But before such a requirement could be imposed, the school would be entitled to a hearing at which HEW would have to prove the allegations of past discrimination.

Maternity Leave

As late as 1971 federal courts ruled it was legally permissible for a school board to require a pregnant teacher to resign. These rulings have been thrown into question by recent events. In 1973 the EEOC issued regulations under authority of Title VII of the Civil Rights Act which prohibit mandatory leave or termination for pregnant women. Shortly thereafter, the Supreme Court decided *Cleveland Board of Education* v. *La Fleur* (1974). The Cleveland school system had a policy requiring pregnant teachers to commence unpaid leave five months before the expected birth. The teacher was not allowed to return to her job until the be-

ginning of the next regular school semester following the date when her child reached the age of three months. There was no assurance that the teacher would be reemployed even at that time, but merely given priority in reassignment to any position for which she was qualified. Mrs. La Fleur did not want to take unpaid leave, as required, beginning in March of 1971, preferring to teach until the end of the school year. She filed suit, and her case ultimately reached the Supreme Court, where it was consolidated with a similar case from Virginia. The school boards supported their policies by arguing that the mandatory leave and delayed reemployment policies were necessary to maintain continuity of classroom instruction and to keep incapacitated teachers out of the school. The Supreme Court rejected both arguments. It found that continuity of instruction could be achieved as well by adequate advance notice by the teacher as by the arbitrary cutoff point. Further, the school boards had no basis for assuming that all pregnant teachers are incapable of classroom duty for the extended period prescribed by the disputed policy. Accordingly, the arbitrary cutoff and delayed reemployment provisions were in violation of the due process clause. Although the court did not comment on the fact that a pregnant teacher is not assured of reemployment following childbirth, it should be mentioned here that such a policy would now presumably violate the EEOC Title VII regulations, as well as HEW regulations under Title IX of the Education Amendments of 1972.

The *La Fleur* case has spawned a collateral issue. Now that school districts are not allowed to prescribe arbitrary unpaid maternity leaves, must the district treat pregnancy as a temporary disability and allow a teacher to use accumulated sick leave to take time off for childbirth? An Oregon teacher who was not allowed to use her sick leave toward childbirth filed suit alleging that the school board's policy was sexual discrimination in violation of Title VII. The Ninth Circuit Court of Appeals agreed, and the school board appealed to the Supreme Court where action has been put off until the 1976-77 term of the Court. *Lake Oswego School District No. 7* v. *Hutchinson.* Although the EEOC has ruled that under Title VII a pregnant teacher cannot be denied her accumulated sick leave for childbirth, a contrary decision by the Supreme Court would presumably supersede the agency ruling. And a contrary ruling would probably nullify an HEW regulation

under Title IX of the Education Amendments of 1972 which requires that schools treat pregnancy as any other temporary disability.

Mandatory Retirement

Mandatory retirement provisions for teachers have been coming under increasing attack in recent years, probably as a result of an increasing awareness that people can be fully productive well past the conventional retirement age. A related concern is the practice of lowering the mandatory retirement age as a budget-cutting technique. Unfortunately for older teachers, recent challenges to public retirement policies have been largely unsuccessful. In 1975 the Arizona Supreme Court held that mandatory retirement at age 65 for teachers was not a violation of equal protection even though the state maintained a different mandatory retirement age for other employees, including college professors. The court found there was a rational basis for distinguishing between teachers and other employees. This decision was appealed to the Supreme Court which refused to review the state court opinion. *Lewis v. Tucson School District No. 1* (1975).

In a related case, a private university lowered mandatory retirement age for all faculty, including tenured professors. The professors challenged the policy on the grounds that it was a breach of contract and a violation of due process and equal protection. The Ohio Supreme Court rejected these challenges by finding that the new retirement age was reasonable and was uniformly applied. Furthermore, the court found that lowering retirement age was a matter within a university bylaw allowing the board of trustees to adopt rules governing appointment and tenure of faculty. The U.S. Supreme Court declined to review the lower court decision. *Rehor v. Case Western Reserve University* (1975).

Both the Arizona and Ohio decisions illustrate the legal difficulties in challenging mandatory retirement provisions. Because age discrimination does not involve a "suspect classification," as found in race discrimination cases, the state or the school board can support the policy merely by showing it has a rational relationship to a legitimate state objective. This has traditionally been an easy burden for the state to sustain. Thus one is forced to conclude that the most fruitful approach to changing current

retirement provisions is not through litigation but through legislative action.

Tort Liability

Although many states maintain "sovereign immunity" regarding the tort liability of the school district, individual school board members and individual employees of the school district can still be sued for personal damages in connection with negligent acts. Because teachers usually have direct and specific supervisory responsibilities, they are the most vulnerable to lawsuits claiming personal injury. Before proceeding, however, it must be emphasized that a teacher is not liable for personal damages every time a student under the teacher's supervision is injured in an accident. A teacher is only required to be as careful as a reasonable and prudent person would be under similar circumstances. And to collect damages against a teacher, an injured student would have to show that the teacher's failure to act as a reasonable and prudent person was the proximate cause for the injury. For example, many cases have involved injuries to students while the teacher left a classroom full of students unsupervised. Even though a student is injured at the hands of another student (e.g., pencil throwing or fighting), the courts have ruled that the teacher had a duty to supervise the students and that it was the breach of that duty which was the proximate cause of the injury to the student. In other words, "but for" the absence of the teacher the accident would not have happened.

In addition to cases involving the duty to supervise, a number of cases pertain to the teacher's duty to instruct students adequately before attempting a potentially dangerous task, such as a chemistry experiment or a gymnastic exercise. Cases in this area suggest that teachers have a greater duty than merely telling students to read a textbook or instruction manual. Rather, teachers have the duty to warn students of the potential danger, to demonstrate where feasible, to closely monitor the task as the student performs it, and to provide appropriate safety apparatus.

And teachers may be held personally liable for depriving students of constitutional rights. A recent Supreme Court case, *Wood* v. *Strickland* (1975) involved the related issue of whether individual school board members could be held personally liable for deprivation of a student's constitutional rights. The Court

ruled that a board member could be liable "if he knew or reasonably should have known that the action . . . would violate the constitutional rights of the student affected, or if he took the action with the malicious intention to cause a deprivation of constitutional rights or to cause injury to the student." There is no reason to expect that any different standard would be applied to teachers sued for depriving students of their constitutional rights. Thus, teachers should make reasonable efforts to keep abreast of legal developments in the rights of students. Recent decisions on student suspensions and corporal punishment, for example, were widely reported in the media and a court might well find that a teacher "reasonably should have known" about these cases. Teachers are not expected to be constitutional scholars, but they can be expected to be knowledgeable of the leading legal developments affecting their profession.

CONCLUSION

The material in this fastback confirms that the legal rights of teachers depend upon a number of forces. To solve any particular problem of teacher rights, it may be necessary to resort to the contract, to state or federal statutes, to Supreme Court decisions, to regulations of the state board of education, or to any number of other sources. But just because the governance of teachers is complex does not mean that teachers are powerless to influence their rights. On the contrary, teachers, perhaps to a greater degree than other groups in the body politic, are in a position to win important victories. Many advances have been made, and will continue to be made, in collective bargaining. Indeed, many rights which would have taken years to establish in the legislature or through the courts have been won in a few minutes at the bargaining table. But teachers have also been successful through lobbying and litigation. As teachers become better organized politically their impact on the legislatures will improve. The trend of electing more teachers to state office also bodes well for teacher rights. Competent legal counsel along with adequate financing has helped win numerous court cases for teachers. All in all, teachers may well be in an enviable position to protect and expand their rights.

It would not be wise, however, for teachers to rest on past victories. The economic situation in state and local governments continues to be a series of crises. Enrollment in public elementary and secondary schools continues to decline. The public appears to be increasingly restless about allegedly poor in-

struction in the schools. All these factors may contribute to an atmosphere where policy makers will decide that teacher rights are not high priority issues. To insure that their rights do not erode, teachers may have to adopt strategies different from those employed in the past to secure rights. They may have to rebuke the tactics of confrontation and enter cooperative endeavors with parents, administrators, students, and others to develop programs to improve education and to enhance communications with the public. As American education changes, teachers may also find it necessary to adapt in order to preserve past gains and to enter the future with a clearer understanding of their high calling.

This book and others in the series are made available at low cost through the contribution of the Phi Delta Kappa Educational Foundation, established in 1966 with a bequest by George H. Reavis. The Foundation exists to promote a better understanding of the nature of the educative process and the relation of education to human welfare. It operates by subsidizing authors to write booklets and monographs in nontechnical language so that beginning teachers and the public generally may gain a better understanding of educational problems.

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